NATURAL RESOURCES BOARD
Districts #2&3 Environmental Commission
100 Mineral Street, Suite 305
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January 3, 2019

Save Our Scenic Corridor
c/o Terry Davison
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Subject: Jurisdictional Opinion #2-311 Martin Auction House and Smoke Shop– Act 250 Permit Series #2W0988 – Townshend, Vermont

Dear Save Our Scenic Corridor:

I write in response to your request for a Jurisdictional Opinion as provided for in 10 V.S.A. § 6007 ("the request"). I include my November 9, 2018 draft opinion which I circulated to Attorney David Cooper at his request as well as his response. This opinion is more expansive but reaches the same conclusion.

This opinion supercedes the February 23, 2018 Project Review Sheet where I concluded that there was no jurisdiction. That opinion was based on incomplete information and an Act 250 jurisdictional determination is only as good as the facts upon which it is based. *In re: Richard and Elinor Huntley*, DR #419, MOD at 2 n.1 (7/3/03).

I. Summary of Opinion

In summary (and for reasons outlined in more detail below), it is my opinion that Act 250 jurisdiction attaches to 653 Vermont Route 30, Townshend VT, the site of "Lawrence's Smoke Shop." Under the facts as described, I conclude that jurisdiction attached when auction cars were parked on the Smoke Shop lot. An Act 250 Land Use Permit Amendment was and still is required. 10 V.S.A.§ 6001 et seq. (Act 250).

II. Facts and Documents

In reaching the conclusion outlined in Section I above, I relied upon the facts provided in the exhibits attached to this decision, supplemented with additional information obtained from the public record, as well as an August 31, 2018 phone call with Henry Martin.

1. Land Use Permit ("LUP") 2W0988 was issued to Henry K. Martin and Arthur E. Monette on October 21, 1994 for "the previous construction of an auction barn and a vault privy." The E911 address for the Townshend Auction House is 683 Vermont Route 30, Townshend, Vermont. The parcel is greater than 1 acre in size.
2. Townshend is considered a "one-acre town" because it has not adopted permanent zoning and subdivision bylaws.
3. The Act 250 application that was relied on for LUP states under Criterion 5 that there is "parking for 50 vehicles…Rte 30 is capable of handling the additional traffic."
4. Parking was shown on Exhibit 9 of LUP 2W0988 as located entirely on the subject lot.

5. LUP 2W0988 Exhibit 8 is a permit from the State of Vermont Agency of Transportation ("VTrans") to reconstruct the existing access onto Route 30.
6. LUP 2W0988 Exhibit 8 states that "in the event that traffic from this project increases to the point where additional lanes for turning or any other modifications are necessary, the expense of such improvements or facilities shall be borne by the Permit Holder, his/her successors, and assigns. The Permit Holder may be required by the Agency to update or provide a traffic study to determine if additional modifications are necessary."
7. LUP 2W0988-1 was issued to Henry K. Martin and Arthur Monette on October 21, 2003 and specifically authorized "the permittees to increase permitted auctions from 12 to 50 a year. There will be no new construction."
8. LUP 2W0988-1 Condition 8 states that "all parking shall be on site."
9. Directly adjacent to the auction house lot subject to LUP 2W0988 and also on Route 30 is a parcel called "Lawrence's Smoke Shop" here-in referred to as the "Smoke Shop lot." The E911 address is 653 Vermont Route 30, Townshend, VT.
10. The Smoke Shop Lot was purchased by Henry K. Martin in 2004.
11. Henry K. Martin stipulates that he "on occasion parked auction vehicles in the parking lot of the Smoke Shop."
12. On August 31, 2018, I had a phone conversation with Mr. Martin during which he told me that cars related to auction events were parked on the Smoke Shop lot soon after this lot was acquired.

III. Analysis

Material Change

An Act 250 permit was required in or around 2004 because cars related to LUP series 2W0988 were parked on the contiguous Smoke Shop lot. This was a material change to LUP 2W0988-1.

> "**Material change**" means any cognizable change to a development or subdivision subject to a permit under Act 250 or findings and conclusions under 10 V.S.A. §6086b, which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. §6086(a)(1) through (a)(10).

Act 250 Rule 2(C)(6)

Mr. Martin received LUP 2W0988 at 683 Vermont Route 30, Townshend for "the previous construction of an auction barn and a vault privy." This project was jurisdictional because it constituted the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws. Mr. Martin received LUP 2W0988-1 to increase permitted auctions from 12 to 50 a year with all parking on-site in 2003 because it was a material change to the original permit. Within a year, Mr. Martin purchased the adjacent parcel ("Smoke Shop lot") and subsequently parked cars associated with the auction on that lot. The Smoke Shop lot became part of the auction project when he used it to park auction related cars on it. At that time, Mr. Martin was required to apply for an Act 250 permit. Parking cars on the auction lot was a material change to LUP 2W0988-1 because it was a cognizable change that had significant impact on Condition 8 "all parking shall be on site." Additionally, the change had the potential for a significant adverse impact on Criteria 5 parking and traffic congestion and 9(K) Impact to Public Investments (Route 30). If the Commission had granted a permit for parking auction

related cars on the Smoke Shop lot, it may have required access and parking changes in conjunction with the VTrans permit and requirements for access on Route 30. A larger parking area for auction events allowed additional traffic where a turn lane may have been warranted by VTrans in accordance with Exhibit 8 of LUP 2W0988. Changes to parking and access between the properties may have been required to satisfy the LUP 2W0988-1 permit requirement that "all parking shall be on-site." While Mr. Martin states that he does not propose to continue using the Smoke Shop lot for auction related purposes because he intends to sell it, that does not negate the necessity of an Act 250 permit and does not erase Act 250 jurisdiction from the Smoke Shop lot. Once development jurisdiction is triggered, it cannot be undone by subsequent events, including a cessation of the activity which triggered jurisdiction in the first place. *In Re John Rusin*, 162 Vt.185, 189 (1994).

Development and Involved Land

Parking cars on the Smoke Shop lot was a material change requiring an Act 250 permit as explained above. An additional jurisdictional basis for requiring an Act 250 permit for parking cars on the Smoke Shop lot is because the project triggered jurisdiction as "involved land." I do not have an exact starting date for when cars were parked on the Smoke Shop lot. This is understandable given that the activity began 14 years ago. From Mr. Martin's estimation, the activity occurred shortly after the Smoke Shop lot was acquired. Because the Smoke Shop lot was purchased by Mr. Martin in 2004, the preponderance of evidence points towards a start date in 2004 or 2005. As such, the relevant law cited below is what was in effect from 1998 to 2006.

Act 250 Environmental Board Rules, Effective July 1, 1998.

Rule 2(A): A project is a "development" if it satisfies any of the following definitions:

> (2) The construction of improvements for any commercial or industrial purpose, including commercial dwelling, which is located on a tract or tracts of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres unless the municipality in which the proposed project is located has elected by ordinance, adopted under chapter 59 of Title 24, to have jurisdiction apply to development on more than one acre of land. This jurisdiction does not apply to construction for farming, logging, or forestry purposes below the elevation of 2,500 feet. In determining the amount of land, the area of the entire tract or tracts of involved land owned or controlled by a person will be used.

Rule 2(F): "Involved land" includes:

> (1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs; and
> (2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which is incident to the use of the project; and
> (3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values

> sought to be protected by Act 250 will be substantially affected by reason of that relationship.
> In the event that a project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction.

Act 250 Environmental Board Rules, Effective January 18, 2001; January 15, 2003; and January 12, 2004 include identical language to the above cited 1998 Rules except that 2(F) "Involved land" was reformatted to read:

> (1) The entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for commercial or industrial purposes will occur, and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of improvements will occur such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the event that a commercial or industrial project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction.

The Smoke Shop lot and auction lots are contiguous and were under common ownership beginning in 2004. The Smoke Shop lot became "involved land" when cars related to the auction business were parked on it. The Smoke Shop lot was used as part of the project. Additionally, there was a relationship between the two lots such that there was demonstrable likelihood that Criteria 5 and 9(K) would be impacted by reason of that relationship.

In an example of involved land jurisdiction, the Court has upheld Act 250 jurisdiction attaching to a contiguous parcel that was acquired many years after Act 250 jurisdiction was triggered and where no commercial use was possible because of zoning regulations. This parcel was still held to be under Act 250 jurisdiction because it was contiguous and bore a relationship that was likely to substantially affect the aesthetic values sought to be protected by Act 250. *Re. Bethel Mills, Inc*., No. 243-11-05 Vtec, Decision at 7 (4/9/06). The court went on to find, "[h]ere however, the Mills parcel is connected to the business use, both by sharing a common boundary and because the residential structure and outbuilding screen the commercial lumber yard from the other residential properties in the adjoining zoning district." *Id*. at 9.

Attorney David Cooper points to the Vermont Supreme Court's decision in *In re Audet*, 176 Vt. 617 (2004) in support of his position that the Smoke Shop lot is not subject to Act 250 jurisdiction. *Bethel Mills* was decided two years after *In re Audet* and the decision makes specific reference to *In re Audet* when distinguishing the facts at issue in *Bethel Mills*. Helpfully, the court explains the difference between the cases in a wholly relevant way to the facts at issue here:

> *Appellant looks to the Supreme Court case of In re: Audet, 176 Vt. 617 (2004), and the Environmental Board's decision in Okemo Realty, Application #900033-2-EB (May 2, 1996) to support its argument that the Mills Parcel is not involved land. In Audet, the Court held that Act 250 jurisdiction did not attach to a parcel of land where the owner had begun and then quickly abandoned a use on the parcel that would have triggered Act 250 jurisdiction, had the use been continued. The parcel in question was separated by three-tenths of a mile from*

> *two other parcels owned by the same party. The two other parcels were contiguous, and were treated as one tract by the Court. However, the contiguous parcels together occupied less than one acre. Thus, Act 250 jurisdiction would not attach unless the third non-contiguous parcel was included as involved land.*
>
> *The Audet Court based its holding on a finding that the "village business [on the contiguous parcels] occupies less than one acre, and has no connection with any other parcel." Audet, 176 Vt. at 621. Here, however, the Mills Parcel is connected to the business use, both by sharing a common boundary and because the residential structure and outbuilding screen the commercial lumber yard from the other residential properties in the adjoining zoning district. In addition, the question in Audet was whether Act 250 jurisdiction would attach at all to any of the parcels under common ownership, whereas here Act 250 jurisdiction has already attached to the lumber mill project area.*

Bethel Mills at 8-9.

Even if the Act 250 Rules in effect from 2006 to the present are used to analyze the facts at issue here, parking cars on the Smoke Shop lot has still triggered Act 250 jurisdiction.

> "**Development**" means…
> The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.

10 V.S.A. §6001(3)(A)(ii)

> "**Tract of land**" means one or more physically contiguous parcels of land owned or controlled by the same person or persons.

Act 250 Rule 2(C)(12)

> "**Involved land**" includes:
>
> (a) The entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for commercial or industrial purposes will occur, and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of improvements will occur such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the event that a commercial or industrial project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction.

Act 250 Rule 2(C)(5)

An "involved land" analysis could be conducted under the current rules that would be identical to the one above under the Environmental Board Rules. However, that doesn't appear necessary,

because the two contiguous parcels fit the definition of "more than one acre of land." 10 V.S.A. §6001(3)(A)(ii). Using a plain language reading of the definition of "development" in a one-acre town, it is very broad and not exclusive to involved tracts of land.

IV. Conclusion

A material change occurred when cars related to the auction business were parked on the Smoke Shop lot. This did and still does require an Act 250 permit. An additional basis for jurisdiction is under 10 V.S.A. §6001(3)(A)(ii) using either the 1998-2006 Environmental Board Rules or the 2006-present Act 250 Rules.

V. Reconsideration or Appeal

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 which is $295.00. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings**.**

Sincerely,

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